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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 577

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, PETITIONERS,

v.

E. B. SPILLER ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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List of Cases Cited.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioners, St. Louis and San Francisco Railroad Company (hereinafter referred to as the Railroad Company) and St. Louis-San Francisco Railway Company (hereinafter referred to as the Railway Company), respectfully represent and show to the Court that the United States Circuit Court of Appeals for the Eighth

Circuit has reversed an order and decree entered by the District Court of the United States for the Eastern District of Missouri, dismissing intervening petitions filed by respondents (hereinafter referred to as interveners) in a certain cause therein pending entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final," whereby interveners sought to establish as preferential claims against the property of the Railroad Company purchased on behalf of the Railway Company at foreclosure sale certain judgments, with interest thereon, obtained by interveners against the Railroad Company in the District Court of the United States for the Western District of Missouri, based on orders of reparation made by the Interstate Commerce Commission in respect of freight charges collected by the Railroad Company from interveners for the transportation of certain interstate shipments of cattle, and has remanded the proceeding in which said order and decree of dismissal was entered to said District Court, with instructions to enter judgment in favor of interveners for the amounts therein set forth, the same to be adjudged as prior in lien and superior in equity to the mortgages of the Railroad Company and directed to be enforced against the property conveyed to the Railway Company at said foreclosure sale (R. 722).

I.

STATEMENT OF MATTER INVOLVED.

In 1903 the Railroad Company advanced freight rates on cattle shipments from the State of Texas and other Western states to Kansas City, Chicago and other markets three cents per hundredweight. These rates were challenged by divers parties as unreasonable and unjust,

the special challenge being by the Cattle Raisers' Association of Texas. The Interstate Commerce Commission (hereinafter called Commission) on August 16, 1905, found the rates were unjust and unreasonable to the extent of the advance of three cents per hundredweight made in 1903 (11 I. C. C. Rep. 296). The Commission made no order on this report and finding and reserved all questions of reparation (R. 243).

After the passage of the Hepburn Act of July 29, 1906, the Commission, on petition, reopened the case. After again trying the case in full, the Commission on April 14, 1908, again pronounced the rates excessive and unreasonable (13 I. C. C. Rep. 418), and made an order prescribing rates for the future to take effect November 17, 1908, being the rates existing prior to the advance made in 1903. Questions of reparation to be allowed only from August 29, 1906, were reserved by the Commission to be subsequently dealt with as specific claims were presented (R. 251, 269).

Between August 29, 1906, and November 17, 1908, the Railroad Company collected from certain shippers of cattle, whose claims are held by interveners, regularly and legally established freight rates, which the Commission on April 14, 1908, found to be unreasonable and unjust to the extent of about three cents per hundredweight. Interveners presented to the Commission claims for reparation based on said excessive rates collected from August 29, 1906, to November 17, 1908, and on January 12, 1914, the Commission ordered the Railroad Company to pay to interveners sums aggregating upward of $30,000.00, including interest to June 15, 1914, as reparation for damages sustained by interveners as the result of the excessive charges so collected (R. 272, 274, 277).

On December 29, 1914, interveners filed suits against the Railroad Company in the District Court of the United States for the Western District of Missouri, at Kansas City, on the orders of reparation made by the Commission (R. 277, 287). On August 16, 1916, interveners recovered judgments in said suits, with interest thereon from August 1, 1916 (R. 288), and such judgments were subsequently on appeal affirmed by this Court on May 17, 1920 (253 U. S. 117), the mandate of this Court being filed in the District Court on June 6, 1920 (R. 292).

On May 27, 1913, on the bill of complaint of North American Company (a general creditor), filed in the District Court of the United States for the Eastern District of Missouri, that court appointed receivers for all of the property of the Railroad Company for the benefit of all its creditors as their interests might appear (R. 11). The receivers took possession of all its property and proceeded to operate it and to distribute the proceeds thereof to its creditors. On April 3, 1914, a like bill was filed by another creditor, and that suit was consolidated with the suit of North American Company. On May 29, 1914, in this consolidated cause, the District Court rendered an interlocutory decree (R. 601) to the effect that all of the property of the Railroad Company was thereby impounded, sequestered and set apart to pay the debts and obligations of the Railroad Company; that all parties who claimed any interest in or lien upon any of the property of the Railroad Company in the hands or control of the receivers should file verified statements of their claims with the Special Master on or before October 1, 1914, and that each of them who failed or refused so to do should, by such failure, be barred from receiving any share in the distribution of any of said funds of the property or of the proceeds thereof. Notice of this order and of the limita-

tion of the time for the presentation of claims, in order to permit the holders thereof to derive any benefit from or share in the distribution of the property in the hands of the receivers or of its proceeds, was ordered to be and was duly given by proper publication of the order itself (R. 603). By subsequent orders the court extended the time for the presentation of such claims, and that time finally expired on February 1, 1916 (R. 604).

On May 22, 1914, the trustees under the general lien mortgage of the Railroad Company, dated August 27, 1907, filed bill for foreclosure. On July 9, 1914, the trustees of the Railroad Company's refunding mortgage dated June 20, 1901, filed bill for foreclosure. The same receivers theretofore appointed were appointed in these proceedings, who immediately took possession of and impounded all the mortgaged property for the benefit of the mortgage bondholders, and by proper orders all these suits were consolidated into a single suit entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final," and the final decree of foreclosure and sale was rendered in this consolidated cause and in each of its constituent causes. Substantially all of the property of the Railroad Company was subject to the mortgages which were thereby foreclosed.

On March 31, 1916, the final decree of foreclosure and sale of all the property of the Railroad Company was rendered (R. 558). On July 19, 1916, all this property was sold under that decree to purchasers for the Railway Company, which subsequently assumed their obligations and received and took charge of the property on or about November 1, 1916. On August 29, 1916, the court confirmed the sale after a hearing upon notice to all parties in interest (R. 636).

Interveners never filed any verified claim to any interest in or lien upon the property or the proceeds of the property of the Railroad Company in the hands of the receivers, as required by the terms of the interlocutory decree, under the provisions of which the time for filing such claims finally expired February 1, 1916. At the hearing on the application for confirmation of the sale on August 29, 1916, interveners gave notice to the parties to the consolidated cause that they had claims against the Railroad Company for illegal freight exactions that had been reduced to judgment in the United States District Court for the Western District of Missouri on August 16, 1916, that an appeal was being taken from that judgment by the Railroad Company, and that interveners would claim that their claims evidenced by that judgment were prior in lien and superior in equity to the liens and claims of every other party whomsoever upon and to the property of the Railroad Company in the hands of the receivers (R. 555). No other or further suggestion, presentation or action was made or taken by interveners to present or prove their claims on or to the property sold and delivered to the Railway Company under the foreclosure decree, or against the Railway Company, until December 2, 1920, when interveners applied to the District Court for leave to file their intervening petitions in the consolidated receivership suit.

The Court granted the application for leave to file such intervening petitions on February 12, 1921 (R. 13, 57); such petitions were filed and referred to a Special Master, who, after hearing same and making extended findings of fact and conclusions of law, recommended that judgment be entered in favor of interveners for the amounts of the judgments awarded by the United States District Court at Kansas City, with interest thereon from August 1, 1916,

and that the entire amount be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and that it should be enforced against the property conveyed to the Railway Company (R. 123). Exceptions to the report of the Master were filed by the Railroad Company and by the Railway Company (R. 180, 198). The District Court did not sustain the conclusions of law of the Master and ordered and adjudged that the exceptions to those parts of the report of the Master, which were contrary to or inconsistent with the views expressed by the Court in its memorandum opinion filed, should be and were sustained, and dismissed the intervening petitions of interveners (R. 222, 223).

From the order and decree of the court dismissing their intervening petitions interveners appealed to the Circuit Court of Appeals, which court on June 24, 1926, by its order and decree reversed the order and decree of the District Court and remanded the case to the District Court with instructions to enter judgment in favor of interveners for amounts equivalent to the judgments obtained by interveners in the United States District Court at Kansas City, with interest thereon from August 1, 1916, the same to be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and directed to be enforced against the propertty conveyed to the Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case (R. 722).

In its opinion filed on such decision, said Circuit Court of Appeals held:

1. That interveners were not barred from presenting their claims by laches, either

(a) by reason of their delay, or

(b) by reason of failing to file their claims as required by the interlocutory decree entered in the receivership case.

2. That while interveners were bound by the terms of the interlocutory and final decrees and the order of confirmation of the sale, yet interveners were entitled to present their claims after the expiration of the time limited thereby, first, because they were claims different from and unlike ordinary creditors' claims, and, second, because they arose after the entry of the final decree, and hence the Railway Company took the property of the Railroad Company subject to the claims of interveners should they be allowed by the court as prior in lien or superior in equity to the mortgages, under the provisions of Article Ninth of the final decree, that the purchasers of the property should take the same subject to

> "(B) Any unpaid claims of creditors of the defendant Railroad Company which have been or shall be admitted by the parties in interest or adjudged by this court to be prior in lien or superior in equity to the Refunding Mortgage or to the General Lien Mortgage" (R. 587);

and under the provisions of Article Tenth of the final decree providing:

> "(c) * * * Notice having been given for the presentation in this cause of claims and demands against the defendant Railroad Company of every character and description whatsoever, and the time for the presentation of said claims having expired, no such claim or demand which has not been presented in this cause in accordance with the orders heretofore made requiring presentation thereof other than * * *
>
> "(2) Any claim or demand which may arise after the entry of this decree,

shall be enforceable against the receivers or against the property sold, or any part or portion thereof, or against any purchaser of the same or any part thereof, his successors or assigns" (R. 589, 590).

3. That the Railroad Company became a trustee ex maleficio for the benefit of interveners of the moneys collected from interveners in excess freight charges afterwards found by the Commission to be unjust and unreasonable and hence unlawful.

4. That interveners were entitled to preference and priority of payment in respect of their claims under the trust fund doctrine, notwithstanding the excess freight charges collected by the Railroad Company from interveners could not be and were not traced into any separate and distinct fund or into any specific property of the Railroad Company in the hands of the receivers, or in the hands of the Railway Company as the purchaser of the property of the Railroad Company.

5. That the action to charge the Railroad Company as a trustee ex maleficio was not inconsistent with the remedy provided by the Act to Regulate Commerce, i. e., an action at law for damages based on an order of reparation made by the Interstate Commerce Commission; that the equitable remedy to impress a trust on moneys wrongfully or unlawfully taken from a shipper in unreasonable and excessive freight charges is not destroyed or abrogated by the provisions of the Act to Regulate Commerce prescribing the remedy and procedure to secure a repayment of the same; and that interveners were not estopped from maintaining their equitable action to charge the Railroad Company as a trustee ex maleficio because of their election to pursue their remedy by reparation under the Act to Regulate Commerce.

6. That interveners were entitled to have their claims set forth in their petitions of intervention established as preferential claims superior to the rights of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company in the District Court at Kansas City, with interest from August 1, 1916, which was more than three years after the date of the appointment of the receivers of the property of the Railroad Company on May 27, 1913.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Your petitioners respectfully submit:

1. That the Circuit Court of Appeals for the Eighth Circuit, in holding that the freight rates in question were wrongfully and unlawfully collected, because later found by the Commission to be unjust and unreasonable, notwithstanding such rates were, when collected, the regularly and legally established rates, has decided a Federal question in a way in conflict with the applicable decisions of this Court.

2. That said Circuit Court of Appeals, in holding that a carrier becomes chargeable as a trustee ex maleficio because of the collection of rates thereafter found by the Commission to be unjust and unreasonable, although such rates were the legally established rates at time of collection, has decided an important question of general law in a way untenable and in conflict with the weight of authority, and has decided an important question of Federal law which has not been, but should be, settled by this Court.

3. That said Circuit Court of Appeals, in holding that, in order to establish a trust in a railroad company for

the benefit of a shipper as to freight charges wrongfully collected because unjust and unreasonable, and to give to such shipper the status of a preferred creditor, it is not necessary to show that the identical money received was placed in a separate account, or to trace the identical fund, has decided a question of general law in a way untenable and in conflict with the weight of authority, and particularly in conflict with the decisions of other circuit courts of appeals on the same matter.

4. That said Circuit Court of Appeals, in holding that an action to charge a railroad company as trustee ex maleficio is not inconsistent with, nor abrogated by, the remedy by reparation provided by the Act to Regulate Commerce, and that interveners were not precluded from pursuing the equitable remedy by reason of having prosecuted an inconsistent remedy by reparation, has decided an important question of Federal law which has not been, but should be, settled by this Court.

5. That said Circuit Court of Appeals, in holding that interveners are not estopped to urge their claims by laches by reason of failure to file said claims pursuant to the provisions of the interlocutory decree in the receivership suit against the Railroad Company, has rendered a decision in conflict with the decisions of other circuit courts of appeals and in conflict with applicable decisions of this Court on the same matter.

6. That said Circuit Court of Appeals, in holding that interveners' claims arose after the entry of the final decree in the receivership suit against the Railroad Company, and that the word "arise," as used in Article Tenth of said final decree, was not synonymous with the word "accrue," has decided an important question of general law in a way untenable and in conflict with the weight of authority.

7. That said Circuit Court of Appeals, in holding that interveners were entitled to have their claims established as preferential claims superior to the rights of other creditors in the amounts of the judgments obtained by them against the Railroad Company in the District Court for the Western District of Missouri, with interest thereon from August 1, 1916, which was more than three years after the date of the appointment of receivers of the property of the Railroad Company on May 27, 1913, has decided an important question of general law in a way untenable and in conflict with the weight of authority.

Your petitioners believe that the aforesaid decree of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

III.

PRAYER.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein, entitled E. B. Spiller et al., Appellants, v. St. Louis and San Francisco Railroad Company et al., Appellees, No. 6,786, to the end that the said case may be reviewed as provided in Judicial Code, Section 240, as amended.

And your petitioners pray that the certified copy of the record and proceedings of said Circuit Court of Ap-

peals, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of certiorari; and your petitioners pray that they may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law; and that the said decree of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

(Sgd) Edmund T. Miller

" Alexander P. Stamos

Attorneys for Petitioners.

State of Missouri, } ss.
City of St. Louis. }

Edward T. Miller

~~Alexander P. Stewart~~, being duly sworn, makes oath and says that he is attorney for petitioners in the above cause; that he has read the foregoing petition and knows the contents thereof, and that the allegations therein are true as he verily believes.

(Sgd) Edward T. Miller

Subscribed and sworn to before me on this 17th day of August, 1926. My commission expires Nov 13, 1928

(C. S.) (Sgd) Walter Kuhr
Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion the said petition is well founded in law, and the case is one in which the prayer of the petitioners should be granted.

(Sgd) Edward T. Miller
Attorney for Petitioners.

IN THE

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No.....

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, PETITIONERS,

v.

E. B. SPILLER ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

Opinion filed in District Court August 23, 1922, on Exceptions to Report of Special Master; North American Company v. St. Louis and San Francisco Railroad Com-

pany; Spiller v. Same; Spiller et al. v. Same, 288 Fed. 612 (R. 199).

Opinion of Circuit Court of Appeals filed June 24, 1926; E. B. Spiller et al. v. St. Louis and San Francisco Railroad Company et al., ... Fed. (2nd) .... (R. 699).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the decree of the Circuit Court of Appeals for the Eighth Circuit to be reviewed.

The opinion of the Circuit Court of Appeals and its decree reversing the decree of the District Court for the Eastern District of Missouri were filed and entered June 24, 1926 (R. 722).

2. The specific claims advanced, and rulings made, in the lower court which are relied upon as a basis of this Court's jurisdiction.

In the Circuit Court of Appeals petitioners advanced the specific claims:

(a) That interveners were guilty of inexcusable laches in failing to file their claims or demands in the receivership suit as required by the interlocutory decree rendered therein, and that their claims were properly dismissed by the District Court.

(b) That interveners were precluded by the final decree and order of confirmation of sale from asserting any claim against the railway company or its property.

(c) That the railroad company in collecting freight charges at the rates then legally in effect did not become a trustee ex maleficio.

(d) That the trust fund doctrine could not be invoked by interveners.

(e) That the trust fund theory was inconsistent with and abrogated by the Act to Regulate Commerce, and by the exclusive remedies for collection by reparation prescribed by that act.

(f) That interveners' claims were not preferred debts of the Railroad Company and if allowable at all could only be established as general unsecured creditors' claims.

The Circuit Court of Appeals ruled:

(1) That interveners were not guilty of laches in failing to file their claims, and it was error to dismiss their intervening petitions on that ground (R. 722).

(2) That interveners' claims arose after the entry of the final decree and interveners were not precluded by the final decree and order of confirmation of sale from asserting said claims (R. 722).

(3) That the Railroad Company in collecting rates which the Commission later found to be unjust and unreasonable, and therefore unlawful, became a trustee ex maleficio (R. 722).

(4) That interveners could invoke the trust fund doctrine, even though the moneys collected could not be traced into any distinct fund or into any specific property (R. 718).

(5) That an equitable action based on the trust fund doctrine was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce (R. 719).

(6) That interveners were entitled to have their claims established as preferential claims superior to the rights of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company, with interest from August 1, 1916, a

date more than three years after the date of appointment of the receivers on May 27, 1913 (R. 722).

3. **Statutory provision under which this Court's jurisdiction is invoked.**

Sec. 240 (a) of the Judicial Code, as amended February 13, 1925 (Chap. 229, Sec. 1, 43 Stat. 938; Sec. 1217, U. S. Comp. Stat. Cum. Supp. 1925).

4. **Cases believed to sustain the jurisdiction of this Court.**

Spiller v. Atchison, Topeka & Santa Fe Railway Co., 253 U. S. 117, in which this Court granted writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184.

Schuyler v. Littlefield, 232 U. S. 707.

Keogh v. Chicago & Northwestern Railway Co. et al., 260 U. S. 156.

STATEMENT OF THE CASE.

Petitioners respectfully refer to "Statement of Matter Involved" set forth in the foregoing petition for certiorari, pages 2 to 10. which statement of the case is incorporated herein by reference.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in holding that collection of legally established tariff rates was unlawful because they were later found to be unjust and unreasonable.

2. The Circuit Court of Appeals erred in holding that the Railroad Company became chargeable as trustee ex maleficio in respect of the excessive charges collected.

3. The Circuit Court of Appeals erred in holding that the trust fund doctrine could be invoked by interveners.

4. The Circuit Court of Appeals erred in holding that an action to charge the Railroad Company as trustee ex maleficio was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce.

5. The Circuit Court of Appeals erred in holding that interveners were not guilty of laches in failing to file their claims.

6. The Circuit Court of Appeals erred in holding that interveners' claims arose after the entry of the final decree and were not barred.

7. The Circuit Court of Appeals erred in holding that interveners were entitled to have their claims allowed as preferential claims superior to the claims of other creditors, including the bondholders.

8. The Circuit Court of Appeals erred in holding that interveners were entitled to interest on the amounts of their claims (judgments) from August 1, 1916.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals that the collection of legally established rates becomes wrongful and unlawful, because such rates are subsequently found by the Commission to be unjust and unreasonable, is erroneous and is in conflict with applicable decisions of this Court.

The charges which form the basis of respondents' claims were collected by the Railroad Company between August 29, 1906, and November 17, 1908. On April 14, 1908, the Commission found the rates to be unjust and unreasonable, and made an order prescribing rates for the future, to take effect November 17, 1908. On January 12, 1914, the Commission made an order of reparation in respect of the excessive charges collected by the Railroad Company during the period mentioned.

The rates collected by the Railroad Company were the lawful tariff rates in effect at the time, and the Railroad Company was under an absolute obligation not only to collect, but to retain, the published rates, whether reasonable or unreasonable, discriminatory or nondiscriminatory.

In Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 437, this Court held:

> "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations,

made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device, in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade."

In Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, 197, this Court said:

"The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate, nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper (February 4, 1887, 24 Stat. 379, c. 104, §2; March 2, 1889, 25 Stat. 855, c. 382, §6; Armour Co. v. United States, 209 U. S. 56, 83). The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

"In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between

free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid."

In Robinson v. Baltimore and Ohio Railroad Co., 222 U. S. 506, 508, it was said:

> "The act (to Regulate Commerce), whilst prohibiting unreasonable charges, unjust discriminations and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect."

No order was, or could have been, entered by the Commission in August, 1905, requiring the Railroad Company to cease and desist from collecting the rates held to be unreasonable for the future, as the Commission did not at that time have power to prescribe rates for the future. It was merely the conclusion of the Commission that the rates then in effect were unjust and unreasonable (11 I. C. C. Rep. 296, 352).

The language used by Judge Sanborn, in his opinion filed in the District Court on dismissing the intervening petitions of respondents, is peculiarly apt (288 Fed. 612, 629-630):

"The railroad company collected these legally established rates. It had the decision and direction of the highest judicial tribunal in the land for its justification, and this court is of the opinion that its collection of these rates was not unlawful. The prohibition of section 1 and that of section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of section 6 constitutes an exception from the general prohibition of section 1. A construction that each prohibition is of equal force and equally applicable in such a case as that in hand would impose upon the carrier a penalty of a violation of section 1 if it complied with section 6, and the penalty of a violation of section 6 if it complied with section 1, and an interpretation which leads to such an absurdity ought to be rejected."

The decision of the Circuit Court of Appeals is not only in conflict with the above controlling decisions of this Court, but is further in conflict with the decision of the same Court of Appeals in the case of Chicago, B. & Q. R. R. Co. v. Merriam & Millard Co., 297 Fed. 1, 3, wherein it was said:

"The claim that the rate was unlawful cannot be sustained. The duly filed and published tariff rate, while it was in force, was the only lawful rate. * * * It is not claimed that the carrier had made any change of these tariff rates at the time of these shipments. The report and opinion of the Commission filed on October 20, 1921, did not purport to and could not annul or change the existing tariff rate. * * * Section 15 of the Interstate Commerce Act required that any change of the rates made by the Commission should be made, not by a report, finding or opinion, but by an order to the carrier to cease and desist from collection of the rate, to take effect not less than thirty days after the date of the order."

In support of its decision in the Merriam & Millard case the Circuit Court of Appeals cited and relied upon the decision of the District Court (288 Fed. 612) in the case now sought to be reviewed; yet the same Court of Appeals, without reference to its decision in the Merriam & Millard case, now overrules the decision of the District Court in the instant case on which the decision in the Merriam & Millard case is founded.

II.

The decision of the Circuit Court of Appeals that the Railroad Company became chargeable as trustee ex maleficio of the excessive charges collected by it, and that the trust-fund doctrine could be invoked by respondents, is erroneous and in conflict with the decisions of this Court, with other decisions of the same Circuit Court of Appeals, and with the decisions of other Circuit Courts of Appeals, on the same matter.

The Circuit Court of Appeals held that the excessive charges were wrongfully and unlawfully collected by the Railroad Company, and that the Railroad Company thereby became chargeable as a trustee ex maleficio and that the trust fund theory could be invoked by respondents to make their claims preferential and to give them priority, notwithstanding the moneys collected from respondents could not be traced into a specific fund or into specific property which came into the hands of the receivers, and that it was not necessary so to trace such moneys.

There can be no fraud, actual or constructive, in which a trust ex maleficio must have its origin, where the Railroad Company collected the only charges permissible under the law, and where it would have been penalized

had it attempted to collect, or had collected, charges other than those designated in the tariffs.

The Court of Appeals conceded (R. 717) that the moneys collected from respondents were comingled with other funds and could not be traced into any separate or distinct fund in the hands of the receivers; but holds that in order to establish a trust in a railroad company for the benefit of the shipper as to freight charges wrongfully exacted it is not necessary to show that the identical money received has been placed in a separate account or to trace the identical fund. In so holding the decision of Court is in conflict with the rule as established by the decisions of this Court and of other Circuit Courts of Appeals.

The proceeds of a trust fund or property wrongfully converted by a trustee can be followed by the cestui que trust and the trust impressed thereon as against the trustee only so long as they can be identified and traced either in their original form or in other funds or property in the hands of the trustee, and where this cannot be done the cestui que trust is not entitled to follow such proceeds into the hands of the trustee or his representative and claim a lien thereon, but is entitled only to come in as one of the general creditors of the trustee.

In Litchfield v. Ballou, 114 U. S. 190, 195, this Court said:

> "If the complainants are after the money they let the city have, they must clearly identify the money, or the fund, or other property which represents that money, in such a manner that it can be reclaimed and delivered without taking other property with it, or injuring other persons or interfering with others' rights."

See also, Schuyler v. Littlefield, 232 U. S. 707.

The decision of the Circuit Court of Appeals is clearly in conflict with the above decisions of this Court. That decision is further in conflict with the previous decisions of the same Circuit Court of Appeals in the following cases:

Empire State Surety Co. v. Carroll County, 194 Fed. 593, wherein the fifth syllabus reads:

> "It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver."

State Bank of Winfield v. Alva Security Bank, 232 Fed. 847, 849, wherein it was said:

> "The capital defect, however, of plaintiffs' theory is their treatment of the grand division of the bank's assets in its reports known as 'Cash and Sight Exchange' as a 'fund' within the law relating to the following of trust funds. To adopt that theory is to re-establish under a mere bookkeeping disguise the exploded notion that a trust fund may be recovered if it can be traced into the general assets of an insolvent estate. The courts have shown a tendency to restrict the 'trust fund' doctrine (Empire State Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435; Board of Commissioners v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. [n. s.] 1109; In re Brown, 193 Fed. 24; Commercial National Bank v. Armstrong [C. C.], 39 Fed. 684). The rule is accurately stated and numerous authorities cited by this Court in the first case referred to as follows:
>
> "'It is indispensable to the maintenance by a cestui que trust of a claim to preferential pay-

> ment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver.' "

Also, Central State Bank v. McFarlin, 257 Fed. 535, and Scullin Steel Co. v. North American Co., 255 Fed. 945.

Said decision is further in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Weideman v. Newton Arms Co., 271 Fed. 302, 304, wherein it was said:

> "But even if the trust relation be established, if the trustee is in bankruptcy or insolvency, it is absolutely necessary to trace the money covered by the trust into some particular property or fund. It is just as necessary to trace as it is to prove the trust relation. There is no pretense of tracing this money into the receiver's hands in any other sense than that the money was spent in carrying on a business or procuring certain articles of machinery and the like, which ultimately passed into the receiver's hands. This is not enough; cash is never traced merely by showing that it went into a general estate. This subject we have recently treated in Re Bolognesi, 254 Fed. 770, 166 C. C. A. 216; Re Matthews, 238 Fed. 785, 151 C. C. A. 635, and Re Jarmulowsky, 261 Fed. 779."

Said decision is further in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of Titlow v. McCormick, 236 Fed. 209, and United States National Bank of Centralia v. City of Centralia, 240 Fed. 93.

There was no fraud, either actual or constructive, committed by the Railroad Company in this case. There was no fiduciary relation between the Railroad Company and the shippers, and no relation of principal and agent in any form. The Railroad Company collected the money in good faith as its own. The only relationship existing between the Railroad Company and the shippers was one of debtor and creditor. The Railroad Company claimed and demanded of the respective shippers as a matter of right certain sums for transporting their cattle. When the shippers paid out the charges they lost title to, or the right to demand the return of, the identical money paid to the Railroad Company. There is no possible ground for the application of the trust fund theory in this case.

The only case cited by the Circuit Court of Appeals in support of its decision in respect of the applicability of the trust fund theory to the freight charges in question and the lack of necessity for tracing the moneys into a particular fund or to specific property is its own decision in the case of Love et al. v. North American Co. et al., 229 Fed. 103. The facts in the Love case were so radically different from the facts in the instant case sought to be reviewed that it is not an authority for the decision of the Circuit Court of Appeals. The two cases are similar only in that both involve overcharges.

In the Love case the claims for the overcharges arose approximately within the six months prior to receivership; in this case the claims arose from five to seven years before the appointment of receivers.

In the Love case the overcharges were collected in defiance of a state statute; in this case the charges were collected under a lawful tariff and were the only charges that could be collected.

In the Love case defendant superseded State made rates and gave bond for the return of the overcharges if the rates were upheld; in this case no statutory or Commission rates were suspended and no bond was given.

In the Love case defendant was required to keep, and did keep, in a separate account, a list of all excessive overcharges collected by it; in this case no separate fund was kept, but the charges were deposited in various banks to the credit of the Railroad Company's checking accounts.

In the Love case the rates involved were intrastate; in this case the rates involved were interstate.

In the Love case the claimants intervened as required by the interlocutory decree; in this case respondents ignored the interlocutory decree.

In the Love case the claims were presented, heard and determined while the receivers were in possession of the property of the Railroad Company; in this case the claims were not presented until more than four years after the Railway Company had come into possession of the property of the Railroad Company under foreclosure decree.

In the Love case no question relating to the interpretation of the Act to Regulate Commerce was involved; in this case the right given rests upon the Act to Regulate Commerce.

In the Love case the Oklahoma Supreme Court made the rates involved effective as of the date of the original order of the Corporation Commission of that State fixing the rates; in this case the rates to be charged were made effective on a future date, to wit, November 17, 1908.

In the Love case the rates collected were rates that the State authority had said could not be collected; in this case the rates collected were the only rates that could have been lawfully collected.

In the Love case there was no election to reduce to judgment the overcharges claimed; in this case an election to sue for damages was made and judgment in damages was obtained.

The Love case is the only case a diligent search has brought to light in which the trust fund theory is applied to a claim based on overcharges. No authorities are cited in support of the trust fund ruling, and the facts in that case are so different from the facts in this case that it cannot be treated as a precedent here.

III.

The trust fund theory is inconsistent with, and is abrogated by, the exclusive remedy for collection of overcharges prescribed by the Act to Regulate Commerce; and the decision of the Circuit Court of Appeals that the equitable remedy is not inconsistent with the remedy by reparation is erroneous.

In its opinion in this case, the Circuit Court of Appeals says:

> "We see no reason why an action at law for money had and received bars an equitable right to enforce a trust ex maleficio after said judgment is secured, in aid thereof" (R. 719).

To this view the language used by the District Court in its opinion in this case is a complete answer (288 Fed., l. c. 630):

> "Moreover, this alleged cause of action to charge the railroad company as a trustee ex maleficio of the moneys collected by it from the excessive charges is not maintainable: (1) Because it is not consistent

with and is abrogated by the Act to Regulate Commerce and by the exclusive remedies for such collections by reparation prescribed by that act; and (2) because the interveners are estopped from maintaining it by their prosecution of their inconsistent remedy by reparation under the act of Congress from 1906 to December, 1920 (Act to Regulate Commerce, §§ 8, 10 [U. S. Compiled Statutes, §§ 8572, 8574]). The theory and indispensable basis of the alleged trust is that the ownership of the moneys collected by the company from the excessive charges never passed from the interveners to the collector, but that the latter took and its successor in interest still holds those moneys in trust for the owners, the interveners. The theory and the indispensable basis for the remedy by reparation provided by the Act to Regulate Commerce is that the interveners lost the title and ownership of the moneys collected by the company, were damaged by that loss, and that those damages are to be paid by the reparation provided by Act to Regulate Commerce, §§ 8, 10 (U. S. Compiled Statutes, §§ 8572, 8574)."

In Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, this Court, in effect, held that the remedy by reparation prescribed by the Act to Regulate Commerce for the collection of excessive charges, where, as in this case, a decision of the Interstate Commerce Commission was essential to determine the unreasonableness and the extent of the unreasonableness of the rates, was exclusive, and that no action at common law could be maintained on account thereof.

A like view was expressed in the case of Texas & Pacific Railway Co. v. Cisco Oil Mill, 204 U. S. 449.

In Keogh v. Chicago & Northwestern Railway Co. et al., 260 U. S. 156, this Court held that a shipper could not recover damages from a carrier under Section 7 of the

Anti-Trust Act for the exaction of rates illegal because unreasonable, but that he was relegated to his remedy in damages under the Act to Regulate Commerce.

The claims of respondents evidenced by the judgments obtained by them against the Railroad Company in the District Court at Kansas City were based upon orders of reparation made by the Commission, a debt the amount of which had been fixed and determined by the Commission. Respondents pursued the remedy prescribed by the Act to Regulate Commerce to collect that debt. That remedy is wholly inconsistent and at variance with the remedy they now seek to pursue by a proceeding in equity to charge the collector of the excessive charges and its successor in interest as a trustee ex maleficio thereof.

In Litchfield v. Ballou, 114 U. S. 190, 194, this Court said of the trust fund theory:

> "That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the property of the complainant, into which his money, not the city's, has been invested, for the reason that there was no debt created by the transaction."

In considering the trust fund theory, the Circuit Court of Appeals for the Fifth Circuit, in Butler v. Western German Bank, 159 Fed. 116, 117, said:

> "The claim is for the funds or property converted or wrongfully withheld. It is not founded on the idea that the defendant owes to the complainant a debt; on the contrary, it is based on the fact that the conduct of the defendant has been such that the relation of debtor and creditor has not been created."

The decision of the Circuit Court of Appeals that the equitable remedy to impress a trust in respect of overcharges is not inconsistent with the exclusive remedy by reparation prescribed by the Act to Regulate Commerce is against the great weight of authority.

IV.

The decision of the Circuit Court of Appeals allowing interest on respondents' claims from a date subsequent to the date of appointment of the receivers is erroneous.

By its decision (R. 722) the Circuit Court of Appeals has ordered and decreed that respondents are entitled to have their claims, in the amounts of the judgments obtained by them against the Railroad Company, with interest thereon from August 1, 1916, established as preferential claims superior to the rights of other creditors of the Railway Company, including the bondholders. Respondents' claims arose when the excessive freight charges were collected in 1908 and prior thereto. These claims were primarily established by the proceedings before the Commission resulting in the orders of reparation, and finally established by the judgments rendered in the District Court at Kansas City on August 16, 1916. The receivers were appointed May 27, 1913, yet the Circuit Court of Appeals now decrees that respondents are entitled to interest on their claims from August 1, 1916, a date more than three years after the date the receivers were appointed and took charge of the property of the Railroad Company. The decision of the Court of Appeals in this respect is in conflict with the decision of this

Court in Thomas v. Car Co., 149 U. S. 95, 116, wherein it is said:

> "As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the fund."

The decision of the Circuit Court is further in conflict on the question of allowance of interest with the decisions of the Circuit Court of Appeals for the Fifth Circuit in the cases of Butler v. Western German Bank, 159 Fed. 116, and Richardson v. Banking Company, 94 Fed. 442, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Merchants Nat. Bank v. School District, 94 Fed. 705, 709.

Not only is the decision of the Circuit Court of Appeals erroneous in allowing interest on respondents' claims for a period subsequent to the appointment of receivers, but said decision is further erroneous in directing that such interest be allowed as a preferential claim. Interest on the excessive charges was not wrongfully collected from respondents under duress any more than were the attorneys' fees which the Court by its decision disallowed.

V.

The decision of the Circuit Court of Appeals that respondents were entitled to have their claims allowed as preferential claims superior to the claims of other creditors, including the bondholders, is erroneous.

If respondents' claims were a proper subject for consideration by the Court, and if respondents were entitled

to have such claims allowed at all, then, under the decisions of this Court and of other circuit courts of appeals in the cases hereinbefore cited, respondents were not entitled to have such claims allowed otherwise than as general unsecured creditors' claims against the Railroad Company. The decision of the Circuit Court of Appeals in holding that respondents were entitled to have such claims allowed as preferential claims superior to the claims of other creditors, including the bondholders, is erroneous and in conflict with said decisions hereinabove cited.

The logical opinion of Sanborn, Circuit Judge, filed in the District Court on the dismissal of respondents' intervening petitions (288 Fed. 612), completely refutes the views expressed by the Circuit Court of Appeals in its opinion in this case and the arguments relied on in support thereof, and petitioners respectfully call the attention of this Court to that opinion.

We respectfully submit that this petition should be granted and the decree reversed.

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